United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2098

UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

- -X

PEDRO ARROYO and CHRISTOPHER McCORMACK :

Plaintiffs-Appellants, :

-against- :

PETER M. SCHAEFER, Former Deputy Warden in Command, Manhattan House of Detention; RALPH SUMOWITZ and PATRICK MAGNER, Assistant Deputy Wardens; KENNETH FERGUSON, CONSTANTINE MELLON and PAUL FELTMAN, Captains; JOSEPH OCHMAN and ROY SCHUH, Correction Officers; and DR. KARP, Institutional Physician, : No. 76-2098

Defendant-Appellees. :

- -X

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P/S

BRIEF FOR PLAINTIFFS-APPELLANTS

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BRIEF FOR PLAINTIFFS-APPELLANTS

QUESTION PRESENTED

Whether the District Court erred in dismissing the complaint after evidence had been presented that (1) defendants had failed to protect plaintiffs, innocent bystanders, from the foreseeable effects of tear gas used upon another detainee and (2) a prima facie case existed as to each defendant.

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Knapp, J.) entered on July 23, 1976 dismissing the amended complaint of plaintiffs Arroyo and McCormack

after plaintiffs had presented their case to the jury.*

In their original complaints, filed pro se in 1972, plaintiffs--prisoner awaiting trial in the Manhattan House of Detention for Men (the Tombs)--sought money damages and injunctive relief pursuant to 42 U.S.C. §1983 against Peter Schaefer, who was then the Deputy Warden-in-Command of the Tombs. Plaintiffs alleged that their right to be free from cruel and unusual punishment was violated when tear gas was used under Schaefer's direction on the floor of the Tombs where they were confined. Plaintiffs alleged that they had not committed any institutional infraction or other misconduct, yet they were forced to remain in nearby locked cells, in a poorly ventilated jail, and endure the effects of the gas.

When defendants moved for summary judgment** the Court appointed William E. Hellerstein, Legal Aid Society Prisoners' Rights Project, to represent the

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*The amended complaint filed for plaintiffs Thomas and Dennis was dismissed for failure to prosecute. No appeal has been taken from that judgment.

**Defendants originally moved to dismiss plaintiffs' complaint for failure to state a claim, but amended their motion to move for summary judgment, placing before the Court defendant Schaefer's report to Commissioner Malcolm concerning the tear-gassing. This report was introduced at trial as Exhibit 1.

plaintiffs. After receiving briefs and hearing argument, the Court denied defendants' motion in open court on April 5, 1974.*

Plaintiffs then amended their complaint, adding as defendants Commissioner of Correction Benjamin Malcolm, Tombs Warden Arthur Rubin (who had succeeded Schaefer), Assistant Deputy Wardens Ralph Sumowitz and Patrick Magner, Captains Kenneth Ferguson, Constantine Mellon and Paul Feltman, Correction Officers Joseph Ochman and Roy Schuh and institutional physician Dr. Karp. Plaintiffs sought declaratory and injunctive relief, and punitive and compensatory damages.

A jury trial of plaintiffs' claim for damages began on July 12, 1976.** On July 14, after plaintiffs completed presentation of their case, the Court granted defendants' motion to dismiss the amended complaint on the grounds that (1) plaintiffs were required to establish malice and had not done so, and (2) plaintiffs had not established the individual liability of any one defendant.

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*No transcript was made of the Court's oral opinion.

**Plaintiffs' prayer for injunctive and declaratory relief (and the concommitant claim against defendant Rubin, who was sued only in his official capacity) was withdrawn prior to trial.

STATEMENT OF FACTS

Plaintiffs Arroyo and McCormack testified to the circumstances surrounding the use of tear gas by defendants on September 12, 1972 at the Manhattan House of Detention (Tombs).

Shortly after the noon meal, while the detainees on the fifth floor were confined to their cells for a "lock-in" period (T. 16, 110),* a correction officer mistakenly opened the cell of Lloyd Hughes, an inmate who was supposed to remain inside his cell throughout the day for punitive reasons ("keep-locked") (T. 14). Mr. Hughes, who had been requesting a phone call and a pair of socks all morning, refused to lock back into his cell until he was given these things (T. 15). His request was again denied by defendant Ferguson (T. 15), and shortly thereafter about eight to ten other officers arrived on the floor, several wearing helmets with facemasks or gas masks and carrying clubs (T. 16, 121). When the detainees on the floor observed three or four of the officers enter the catwalk with a tear gas cannister, they requested that they be permitted to leave the area (T. 15-16, 128). Instead of

*Numbers in parentheses preceded by "T" refer to pages of the transcript.

acceding to this request, an officer proceeded to discharge the tea gas in the direction of Mr. Hughes, who moved to avoid it (T. 16).* Almost simultaneously, other officers entered the gallery area and subdued Mr. Hughes (T. 17-18).**

Plaintiff McCormack was approximately fifteen feet away from the gas when it was discharged; he testified that the gas was sprayed in bursts of three or five seconds amounting "all told [to] about 15 seconds worth" (T. 17). Plaintiff Arroyo, whose cell was only two to three feet from where Hughes was when the gas was sprayed at him, testified that it was discharged about three times and some entered his cell (T. 113).

After the gassing, plaintiff McCormack was choking and gasping (T. 18). Mr. Arroyo testified that his eyes and skin were burning, he felt like he was choking and his nose was running (T. 114). Plaintiffs and the other fifth floor inmates pleaded again to be let out

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*It was established through a report prepared by defendant Schaefer that defendant Ochman was the officer who discharged the gas (Ex. 1, T. 142).

**During the incident Hughes, who was about 5' 5" and weighed 120 pounds, threw a cup and dustpan at the onrushing officers (T. 18).

of their cells and removed from the area (T. 17, 115); their pleas were ignored by the officers and they were forced to remain in their cells anywhere from 45 minutes to two hours longer until the next regularly scheduled lockout period (T. 19, 114). Even when released from their cells, they were not permitted to leave the immediate area, take showers or see a doctor, nor were the section's windows opened (T. 19, 20, 115, 116).*

Dr. Peter Schnall, an internist associated with Montefiore Hospital and the Martin Luther King Health Center (T. 60, 61), who had experience in the treatment of individuals exposed to tear gas, testified that CN tear gas (the gas used upon plaintiffs [T. 144]) is a potent chemical (T. 66). When as little as 45/10,000 of an ounce is discharged, the gas is extremely irritating to all moist membranes of the body--eyes, nose, throat and lining of the respiratory tree--and causes burning and tearing of the eyes and a burning sensation in the chest (T. 66-67). Dr. Schnall stated:

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*Commissioner Malcolm confirmed that there were problems with the Tombs' ventilating system (T. 167).

> If you are a recipient of tear gas being fired at you the reactions that people have described are one of fear and concern about injury and it is extremely frightening to inhale tear gas. You feel like you can't breathe, that you are asphyxiating, that you are desperate for air if you get significant amounts into your lungs, and it is quite frightening (T. 107).

Because tear gas has "a cumulative toxic effect [that increases] with time" it is essential that individuals exposed to the gas be removed from the area (T. 82-83).* The Department of Correction's chief executive officer, Commissioner Benjamin Malcolm, testified that he also regards the use of tear gas as a serious matter, wants it to be used only as a last resort and expects that innocent inmates will be removed from the area before the gas is used (T. 160, 162-163).

Plaintiffs were unable to identify the officers who used the gas and who failed to heed their requests to be released from their cells (T. 121).** However, a report

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*The lingering effects of the gas is illustrated by the fact that the officers who came on duty on the fifth floor at 4 P.M. wore gas masks (T. 56).

**As previously noted, several of the officers who reported to the floor were wearing gas masks or face guards.

submitted to Commissioner Malcolm by defendant Schaefer, Commanding Officer of the Tombs, identified the defendants as the officers involved in the incident.* This report, introduced as Exhibit 1 (T. 142), stated that defendant Roy Schuh was the floor officer who had the initial encounter with Hughes (¶2). Defendant Kenneth Ferguson, a captain, was summoned initially by Schuh and he in turn called for further assistance from defendants Ralph Sumowitz and Patrick Magner, Assistant Deputy Wardens, Captains Constantenence Mellon and Paul Feltman, and correction officer Joseph Ochman (¶3, 5). Assistant Deputy Warden Magner directed the officer personnel in subduing Mr. Hughes (Ex. 1, ¶5).

Plaintiffs also introduced into evidence answers to plaintiffs' interrogatories demonstrating that correctional personnel were trained in the use of tear gas and the precautions necessary to ensure that the gas would not be used unnecessarily and that inmates exposed to the gas would be treated so as to minimize its impact (T. 144-148). Finally, plaintiffs put into evidence a number of rules and regulations of the Department of

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*Plaintiffs also sued Deputy Warden Schaefer, who had directed the actions taken by his subordinates (Ex. 5, T. 148), and institutional physician Karp, who although present during the gassing made no effort to assist plaintiffs (Ex. 1, ¶6).

Correction which established the responsibility of correction officers and supervisory personnel to act to protect inmates from harm.

At the outset of the argument on the motion to dismiss, the Court took the position that liability in damages under 42 U.S.C. §1983 could not flow from a failure to act: "This is a suit against individual people whom you have to prove did something to your clients" (emphasis added) (T. 171).

Later, the Court stated that the defendants could not be jointly liable by virtue of a common failure to act:

> MS. SMITH: ...I believe that a correct statement...is that they all had a duty to act by virtue of the Department rules and regulations.
>
> THE COURT: That can't be so.
>
> MS. SMITH: That doesn't mean that everybody has to rush up there, but if somebody isn't doing this then each of them is required by the department rules to protect the safety of the inmates. If there is one correction officer left there--
>
> THE COURT: I have to know which one. If they all went off and left, I have to know which one. We can't have negligence.
>
> MS. SMITH: They all had a duty to act and they all failed to act.

THE COURT: If that is the law you have a good reversal, because I'm not ruling that (T. 193).

These positions stemmed from the Court's belief that plaintiffs were required to prove that defendants acted deliberately with the intent of violating their rights. In the Court's words

> ...[W]hat the jury would have to find as against any defendant as to which the case was submitted was that a defendant, knowing he was doing wrong with respect to a plaintiff, went ahead and did wrong with respect to that plaintiff (T. 200).
>
> * * *
>
> He acted deliberately to violate the defendants [sic] constitutional rights. That is malice as far as I am concerned. ...Knowingly and intentionally done something he knew was wrong. That is the way I read it. Unprovoked attack on a prison guard, something of that nature. Not just an error in judgment (T. 207).

Thus, the Court rejected the notion that the Departmental regulation requiring members of the Department "to look after [inmates'] welfare" (T. 188; Ex. 9) could serve as the basis for the defendants' liability.

> I think you have to have proof (of) more than that in order to sue him. If you are suing the City or if this were a negligence action, that would be different. But you are saying that Captain Feltman deliberately deprived your clients of their constitutional rights,

> and I don't see that you have proved that (T. 188-89).
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> * * *
>
> I assume for the sake of argument that there is one villain in this crowd; I will assume for the sake of argument that there was one fellow in this crowd who had an evil heart and who deliberately refrained from opening this fellow's door. But I can't award a judgment against all of them on the theory that one of them was at fault (T. 192).

At one point during the argument, the Court agreed that the failure of the highest ranking officer on the scene to act could create a cause of action (T. 201). However, when it was pointed out that there were two supervisory officers of equal rank present, the Court reversed itself, stating:

> You had two deputy wardens of equal authority, so you have no way of showing which one had the responsibility...Suppose the fact was that one of them was guilty as hell and the other had nothing to do with it. They both had responsibility and one of them had an evil heart the other one had a good heart. There is no evidence before me of which (T. 203).

The Court summarized its ruling in the following terms:

> ...[W]ith respect to the defendant Commissioner Benjamin Malcolm* and Warden Peter Schaefer, I dismiss on the ground that the requirements of Johnson v. Glick have not been complied with.

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*No appeal has been taken from the dismissal as to Commissioner Malcolm.

As to the defendant Dr. Karp, I dismiss on the ground that there is no evidence that he knew that any plaintiff was in need of medical attention, and therefore, no evidence that he failed to give any plaintiff any medical attention, nor is there any evidence that he had duties beyond giving medical attention to such persons whose needs might come to his attention.

With respect to all other defendants with the exception of Joseph Ochmann, there is no evidence, assuming that among the group there may have been one or more who either did something adverse to the plaintiffs or who had an obligation to do something favorable to the plaintiffs, there is no evidence to indicate which if any of the several defendants either did such unlawful act or failed to do such necessary act.

I reject plaintiffs' theory that individual liability can be fastened on the group absent some evidence of conspiracy between them, which is neither alleged nor proved in this case.

That leaves the defendant Ochmann, who is shown to have handled the dust projector from which the allegedly offending gas came. There is evidence which, if believed, that with respect to the plaintiff Arroyo gas emanating from the projector touched Arroyo. However, I find there is no evidence from which a jury could properly find that the defendant Ochman was guilty of anything more than an error in judgment, and that he was guilty of any act similar to the one described by Judge Friendly in the Johnson case as an unprovoked attack on a prisoner. I find that the evidence is he was confronted with a situation where it certainly was within the realm of judgment in that tear gas was necessary or appropriate as to Hughes and certainly not a situation

> where Ochmann either should be expected to or could appropriately have gone against the orders of his superiors to act in a situation.
>
> Therefore, for the reasons indicated, I dismiss the complaint with exception to the plaintiffs (T. 209-211).

ARGUMENT

> THE COURT ERRED IN DISMISSING THE COMPLAINT AFTER EVIDENCE HAD BEEN PRESENTED THAT (1) DEFENDANTS HAD FAILED TO PROTECT PLAINTIFFS, INNOCENT BYSTANDERS, FROM THE FORSEEABLE EFFECTS OF TEAR GAS USED UPON ANOTHER DETAINEE AND (2) A PRIMA FACIE CASE EXISTED AS TO EACH DEFENDANT.

A. The Failure to Protect Innocent Bystanders such as Plaintiffs from the Forseeable Effects of Teargas used upon another Detainee States a Claim for Violation of Plaintiffs' Rights under the Due Process Clause.

To sustain their burden of going forward in this action for damages pursuant to 42 U.S.C. §1983,* plaintiffs were required to show that (1) the conduct complained of was done by some person(s) acting under color

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*42 U.S.C. §1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

of state law* and (2) such conduct deprived plaintiffs of their constitutional rights. Monroe v. Pape, 365 U.S. 167 (1961).

Housed in the Tombs because they were unable to make bail, plaintiffs were entitled to be treated as more than "human baggage." Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975). As pre-trial detainees, plaintiffs had the right under the due process clause of the Fourteenth Amendment not to be deprived of the rights of other citizens to a greater extent than necessary to assure their appearance at trial and the security of the jail. Rhem v. Malcolm, 507 F.2d 333, 336-37 (2d Cir. 1974); Detainees supra; Rhem v. Malcolm, 527 F.2d 1041 (2d Cir. 1975).

Here the evidence was that defendants' conduct deviated sharply from this basic standard. First of all, although the unruly inmate was of very slight build and at least eight officers were available to subdue him, defendants employed a method--tear gas--which would inevitably have some harmful impact upon innocent inmate bystanders locked in nearby cells (the request by plaintiffs

*Defendants, correctional employees of the City of New York, plainly acted "under color of state law". Monroe v. Pape, supra.

and others to be allowed to leave the area before the gas was used was ignored).* After the gassing, despite plaintiffs' obvious distress and pain**, the defendants again ignored plaintiffs' pleas to be let out of their cells. Even when released from their cells anywhere from 45 minutes to two hours later, plaintiffs were not allowed to leave the immediate vicinity, take showers or see a doctor.*** That plaintiffs' need for assistance continued for some time is shown not only by their testimony about their suffering, but also by the fact that several hours after the gassing officers on the floor were wearing gas masks.

The facts presented thus clearly evidenced a deprivation of plaintiffs' due process right to be treated not as inanimate objects but as human beings whose

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*It is noteworthy that several of the officers who reported to the floor wore gas masks; none, of course, were offered to plaintiffs.

**As Dr. Peter Schnall, an internist who testified about the effects of tear gas, stated"...it is extremely frightening to inhale tear gas. You feel like you can't breathe, that you are desparate for air..." The normal fright and anxiety was undoubtedly heightened for plaintiffs, unable to avoid the effects of the gas because confined to locked cells.

***Although defendant Karp, a physician, was present during the tear gassing, he made no effort to assist plaintiffs.

suffering would be regarded as having some significance. Indeed, the District Court's ruling on the defendants' motion for summary judgment had held that plaintiffs' complaint stated a claim under §1983.

Contrary to the Court's assertion in granting defendants' motion to dismiss at the close of plaintiffs' case, proof of specific intent is not necessary to establish a defendant's liability under §1983. Monroe v. Pape, supra, 365 U.S. at 187. Rather, section 1983 is "read against the background of tort liability that makes a man responsible for the natural consequences of his actions". Id. For this reason,

> the plaintiff need not show malice or ill-will to prove his action under section 1983. All that is required is that he demonstrate state action which amounts to an actual deprivation of Constitutional rights or other rights guaranteed by law. Dowsey v. Wilkins, 467 F.2d 1022, 1025 (5th Cir. 1972).

See also, Pierson v. Ray, 386 U.S. 547 (1967); Daniels v. Van DeVenter, 382 F.2d 29 (10th Cir. 1967); DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966).

Nor is liability under §1983 restricted to acts of commission as the Court implied. Where the defendant is under some affirmative duty to act and yet fails to do so, he may be held responsible under §1983 where a violation of plaintiff's constitutional rights has resulted.

See, e.g. Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974); Smith v. Ross, 482 F.2d 33 (6th Cir. 1973) (law enforcement officer can be liable under §1983 when by his inaction he fails to perform statutorily - imposed duty); Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976) (supervisory official liable under §1983 if he refuses to intervene where his subordinates are beating inmate in his presence); Byrd v. Brishke, 466 F.2d 6, 10-11 (7th Cir. 1972) (same responsibility exists as to non-supervisory officers present at scene of such summary punishment); Shannon v. Lester, 519 F.2d 76 (6th Cir. 1975) (refusal of prison authorities with knowledge of inmate's injury to provide medical treatment may constitute violation of due process); Curtis v. Everette, 489 F.2d 516 (3rd Cir. 1973).

Here defendants, correctional employees of the City of New York,had the responsibility under Department of Correction rules for "the proper care and treatment of inmates" and were required to "look after (the inmates') welfare" (Ex 9, Rules 3.43; 5.5). It scarcely needs pointing out that in a jail setting where an inmate's ability to ensure his own protection is extremely limited, an officer's failure to act when necessary to protect an inmate from harm can have severe consequences. See Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972).

As this Court has declared, even "an isolated omission to act by a state prison guard" may support a claim under §1983 where "recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control and dependent upon him" is shown. Williams v. Vincent, supra, 508 F.2d at 546. See also Waltenberg v. N.Y.C. Department of Correction, 376 F. Supp. 41, 44 (S.D.N.Y. 1974) (Gurfein, J.) (where prison officials put on notice of complained-of conditions, decision not to remove prisoner from floor containing tubercular inmates could subject officials to liability).

In this case, defendants' deliberate indifference to plaintiffs' predicament is obvious. Both the officers' training and the manufacturer's literature indicated the potency of the tear gas being used on plaintiffs and each spelled out the precautions to be taken during and after its use. In addition, plaintiffs and other inmates called out repeatedly to be released from their cells and the gas-laden tier, but to no avail.

B. The proof presented by plaintiffs established a prima facie case against each defendant.

Plaintiffs sustained their burden of going forward as to each defendant.* Thus, although defendant Schaefer was not present at the time the gas was discharged, he conceded that he had directed the actions taken by his subordinate (Ex. 5). This sharply distinguishes the instant case from Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973) where the allegation was simply that Warden Glick was in charge of the jail and no claim was made that he had authorized the beating inflicted upon plaintiff by a correction officer. See also Wright v. McMann, 400 F.2d 126, 134-35 (2d Cir. 1972); Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1972) (warden had authorized officer's conduct); Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975).

Assistant Deputy Wardens Magner and Sumowitz, the highest ranking officers present when the gas was used, clearly had a responsibility under Departmental Rules**

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*In deciding the motion to dismiss, the Court is required to view the evidence in the light most favorable to plaintiffs. Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962).

**See Ex. 9, §3.40, 5.5.

to see to it that innocent bystanders such as plaintiffs were released from the area in which gas was used as soon as Hughes was subdued. See Restatement (Second) of Torts §320 (1965); Prosser, Torts, supra, §56, pp. 348-49. The fact that there were two officials of coequal authority in no way alters this conclusion,* since in tort law it is well-established that several defendants may be liable to plaintiff where the tortious conduct of each contributed to the resulting injury. Restatement of Torts, supra, §439; Prosser, Torts, supra §47 P. 297. Slater v. Mersereau, 64 N.Y. 138 (1876); Simmons v. Everson, 124 N.Y. 319 (1891). Likewise, when there is a common duty to exercise care to prevent a particular occurrence, and two or more defendants have failed to perform their obligation, each is liable. Prosser, Torts, §52, p. 315 (4th Ed. 1971).

The remaining defendants, Ferguson, Mellon, Feltman, Ochmann and Schuh were also shown to have been present at the tear-gassing and yet did nothing to protect plaintiffs from harm. Every officer of the Department is

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*In any event, defendant Magner apparently played a more active role in directing the operation against Mr. Hughes.

charged with a duty of protecting the safety and welfare of the inmates in custody; as noted above, the fact that several officers had forsaken this duty does not relieve each of them from liability for the resulting injuries. See Prosser, supra, §33, p. 17. Non-supervisory officers are not insulated from liability for the reasonably foreseeable consequences of the neglect of their duty simply because supervisory officers are also present. Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972).*

Of course, had the District Court denied defendants' motion at the close of plaintiffs' case, each defendant would have had the opportunity to present evidence concerning the good faith and reasonableness of his own actions. Where there are "reasonable grounds for the [action taken] at the time and in light of all the circumstances, coupled with good faith belief" liability does not attach. Scheuer v. Rhodes, 416 U.S. 232 (1974). However, upon the record before this Court plaintiffs clearly established a prima facie case, and the dismissal

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*Dr. Karp, as the institutional physician who saw the gas being used, and who must be presumed as a medical expert employed in a correctional facility to have known something about the hazards of tear gas, had the duty to inquire as to plaintiffs' condition and see that appropriate assistance was offered any detainee who had been gassed along with Hughes.

of their complaint should be reversed.

Any other result in this case would substantially weaken the right of pre-trial detainees to be free from harm* and to be accorded the care and dignity due to them as unconvicted citizens. It would surely be against public policy to sanction defendants' gross indifference to plaintiffs' safety, on the theory that the presence of several officers vitiated the duty of each to protect plaintiffs.

As this Court stated in Rhem v. Malcolm, supra, 507 F.2d at 342, quoting from the words of Blackstone more than two hundred years ago:

> ...in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters or subjected to other hardships than such as are absolutely requisite for the purposes of confinement only.
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> * * *
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> 4 Blackstone, Commentaries 300.

Plaintiffs' evidence indicated that defendants' conduct fell woefully short of this standard. Since plaintiffs established a prima facie case of denial of their rights

*N.Y. State Association for Retarded Children v. Rockefeller, 357 F. Supp. 753, 764 (EDNY, 1973).

under the due process clause, it was improper for the District Court to dismiss without requiring defendants to go forward.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF DISMISSAL SHOULD BE REVERSED, AND THE CASE SHOULD BE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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Dated: October 15, 1976

AFFIRMATION OF SERVICE

I hereby affirm that on October 15, 1976, the within Brief and Appendix was served upon attorney for defendants-appellees W. Bernard Richland, Corporation Counsel, City of New York, Municipal Building, New York, New York by depositing true copies of same in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office.

Marjorie M. Smith

MARJORIE M. SMITH